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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 614

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In the Matter of
STANDARD COAL MINING & CONVERTERS CORPORATION, Bankrupt

RALPH M. BROCK and HENRY E. BECKER,
Petitioners,

vs.

ROBERT C. SOLOMON, Trustee, etc.,
Respondent.

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Ralph M. Brock.

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Your petitioner, Ralph M. Brock, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit, entered on November 16, 1949, affirming the judgment of the United States District Court for the Southern District of Illinois, Southern Division.

Your petitioner is further aggrieved by the order of the United States Court of Appeals for the 7th Circuit, denying his petition for a rehearing in this cause entered on January 19, 1950.

Opinion Below.

The opinion of the United States Court of Appeals has not been officially reported, but may be found in the record.

Jurisdiction.

The judgment of the United States Court of Appeals for the 7th Circuit was entered on November 16, 1949. The order of the United States Court of Appeals, denying the petition for rehearing was entered on January 19, 1950. The jurisdiction of this Court is invoked under Section 1254 of the Judiciary Procedure Act, Title 28 USCA, section 1254, effective September 1, 1948.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On June 25, 1947, the Standard Coal Mining & Converters Corporation, of which your petitioner was President, was adjudicated a bankrupt by the United States District Court for the Southern District of Illinois, Southern Division.

Thereafter, on August 31, 1948, an order was entered in the United States District Court for the Southern District of Illinois, Southern Division, by the Honorable Basil H. Coutrakon, Referee in Bankruptcy, finding that your petitioner had in his possession on the day of the filing of the petition in bankruptcy the sum of $17,500.00, belonging to the bankrupt, and ordering him to turn over such sum within ten days from the service of a copy of the order. A similar order was directed against Henry E. Becker.

On March 28, 1948, a hearing was had in the United States District Court for the Southern District of Illinois, Southern Division, before the Honorable Charles G. Briggle, one of the judges of said Court, on the Referee's Certificate of Contempt. An order of committment was entered on that day against petitioner, placing him in the custody of the Attorney General of the United States for confinement (R. 68, 69, 70).

This order found that petitioner had in his possession on August 31, 1948 the sum of $17,500.00, belonging to the bankrupt estate and had wilfully and in contempt of Court, failed and refused to pay such sum to the Trustee in bankruptcy. Petitioner was taken into custody on March 28, 1949, and incarcerated in the City Jail at Springfield, Illinois, where he remained until June 15, 1949, when he was released on bond approved by the United States Court of Appeals for the 7th Circuit.

Evidence.

At the hearing before the District Court, your petitioner testified at some length that he was unable to comply with the turn-over order, either at the time it was entered or at the time of the hearing (R. 41, 42, 43).

He was not permitted to show that the money he is accused of withholding was spent, nor was he allowed to testify as to the purposes for which it was withdrawn by him and used (R. 41).

Matters Urged in the Court of Appeals.

Two chief points were raised in the Court of Appeals—first, there was no evidence that petitioner had $17,500.00 belonging to the bankrupt estate on March 28, 1949, but there was evidence showing that he did not have such money or any part thereof, and, second, that the District Court did not take into consideration his present ability to comply with the order.

Questions Presented.

Whether the Court of Appeals, although deciding that inability to comply with the turn-over order of the District Court would constitute a defense in a contempt proceeding, erred in refusing to direct the District Court to inquire into petitioner's present ability to turn over the sum of $17,500.00, thereby rendering ineffective its opinion.

Reasons for Granting the Writ.

The decision of the Court of Appeals in this case conflicts with decisions of this Court. It has served completely to emasculate effective relief in cases of the character of this case.

The Court of Appeals recognized that the District Court had committed error. This is conclusively shown in the final two paragraphs of its opinion:

"We are also admonished by the Supreme Court in the *Maggio* case, *supra,* that the proper enforcement of turn-over orders can be resolved only by the good judgment of the trial court, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which would bring discredit to the judicial process.

"At the hearing herein, the trial court seemed reluctant to admit testimony as to what Brock and Becker did with the funds withdrawn from the bank accounts of bankrupt, apparently on the theory that the turn-over order was *res adjudicata* and could not be collaterally attacked. We agree that such order was *res adjudicata,* but we are of the view that such testimony was relevant and material. If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail "until he shall purge himself of his said contempt" should be modified, or the commitment vacated, and Brock and Becker released, but until such time, the order shall stand and it is hereby."

Despite this language, the Court of Appeals affirmed the decision of the District Court.

Prior to the decision of this Court in the case of *Maggio* v. *Zeitz*, 333 U. S. 56, there might have been some question in the minds of judges and lawyers as to how a contemnor, unable to comply with a turnover order could purge himself of contempt without spending the rest of his life in jail. It seems quite apparent that by the decision, the Court undertook to clarify the law applicable to cases of this nature and to insure that no further injustice be inflicted upon persons finding themselves in a similar situation.

The facts in *Maggio* v. *Zeitz* are almost identical with those involved here. There the alleged abstraction by the bankrupt also took place several months before bankruptcy and over a year before the turnover order was issued.

There, as here, the only evidence that the goods were in Maggio's possession at the time of the contempt proceedings was the proof of his one time possession and a "presumption", because of the absence of a credible explanation of his disposition of the goods, that he continued in possession of them. There, as here, both the District Court and the Court of Appeals apparently adhered to the "presumption" by affirming the turn-over order and considering it "*res judicata* and the injustice beyond reach on review of the contempt order." (*Maggio* v. *Zeitz*, 333 U. S. 56, 60.)

In the instant case, the District Court took into consideration the action of your petitioner only as of the date of the bankruptcy, and the Court of Appeals, by its refusal to direct the District Court to hear evidence as to the disposition of the funds and the present inability of petitioner to comply with the order has, in effect, ignored the decision of this Court in *Maggio* v. *Zeitz*.

The evidence at the hearing here clearly shows that the District Court did exactly what the Supreme Court con-

demned. The evidence conclusively rebutted any presumption of present possession of the funds.

If this matter comes up again, under the present decision of the Court of Appeals, the District Court "must thus affirm orders, which first direct a bankrupt 'to do an impossibility, and then punish him for refusal to perform it • • • '". (*Maggio* v. *Zeitz*, 333 U. S. 56, 69.)

CONCLUSION.

Your petitioner has already served almost three months in jail. Under the mandate of the Court of Appeals, he will be incarcerated for an indefinite term, being unable to purge himself of the contempt in a manner satisfactory to the District Court. If your petitioner has committed a crime, the Government or the State of Illinois is not precluded from proceeding with its prosecution in a legal manner. As the matter now stands, however, he faces the prospect of an indefinite stay in jail, without hope of being able to help himself.

The decision by the Court of Appeals is one of general importance, and is in direct conflict with decisions of the Supreme Court. It is respectfully submitted that the decision of the Court of Appeals, for the reasons we have suggested, clearly merits review by this Court.

Respectfully submitted,

LEO L. DONAHOE,
Attorney for Petitioner,
Ralph M. Brock.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

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STATEMENT.

Respondent directs attention to the following inaccuracies in Petitioner's Statement.

Page 3, Paragraph 3: The hearing before Judge Briggle is erroneously stated as March 28, 1948, instead of March 28, 1949.

Page 4, Paragraph 2: The statement to the effect that Petitioner "was not permitted to show that the money he

is accused of withholding was spent'' is not supported by the record.

Petitioner was the President of the Bankrupt Corporation. He controlled and dominated its affairs and the funds were under his direction and supervision.

On May 10, 1947, the very day the Receiver was appointed for the Bankrupt Company, he wrongfully abstracted from the bank the moneys which belonged to, and were the property of this estate, and which funds should have been forthwith turned over to the Receiver. No evidence was offered by petitioner to show that any disposition was made by him of the specific money which the Court found was in his possession. He was afforded full opportunity to do so.

Petitioner was interrogated by his counsel, the counsel for the Trustee and the Court. Counsel for the Trustee and the Court attempted in vain to secure from Petitioner answers to questions propounded to him pertaining to his property. The responses were foreign to the questions propounded and were obviously intended to be evasive.

On the very day (May 10, 1947) the Receiver was appointed, Petitioner, appropriated to his own use the sum of $13,500.00 in cash. Petitioner testified that on that day he owned a residence at Arlington Heights which he had purchased for $20,000 (T. 44), a New Buick Roadmaster Sedan Automobile (T. 48, 49, 50), and four service gasoline stations in Chicago (T. 48). On the day that he filed his answer to the Trustee's petition for a turn-over order, February 27, 1949, he transferred his residence to Sheldon Floyd, in trust, who transferred it to the Liberty National Bank, in trust (T. 46). He did not know whether certain mortgages were placed on the property before or after bankruptcy (T. 47). After the bankruptcy, he formed

separate Corporations for each gasoline station, to whom he transferred the properties (T. 48, 49). One of the stations had been owned by Petitioner and Pfundstein since 1938 (T. 49). He did not know whether Pfundstein was related to Henry E. Becker (T. 48).

Standard Coal Mining & Converters Corporation was incorporated November 16, 1942, for the purpose of engaging in the coal mining business. In the Fall of 1946, it engaged in another venture. It solicited and received cash deposits of approximately $350,000 for the sale of steel. No steel was delivered and the deposits were not returned. All of the money was retained, and the persons who deposited their money and received nothing therefor constitute a portion of its creditors (T. 20).

ARGUMENT.

Respondent opposes the Petition. There are no special or important reasons specified in the Petition as are required by Rule 38 (5) of this Court.

The Petition appears to be based upon the contention that the decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Maggio* v. *Zeitz*, 333 U. S. 56.

We wish to point out that the decision of the Circuit Court of Appeals is in accord with the opinion of this Court in the *Maggio* case. This Court in the *Maggio* case said (333 U. S. at p. 75):

> "the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession."

This Court further held in the *Maggio* case that the Bankrupt did not meet this issue "by his own denials which the Court finds incredible in context."

The Circuit Court of Appeals with respect to the testimony of Petitioner states:

> "In many respects their testimony was vague, uncertain and unsatisfactory, especially as to the exact nature and amount of assets formerly owned by each of them. The trial Judge had the opportunity to observe appellants upon the witness stand and we must accept his judgment as to their credibility. The Court announced he was convinced beyond a reasonable doubt that Brock and Becker knowingly and wilfully failed

to comply with the Referee's turn-over order. He made findings that on August 31, 1948, the date of the turn-over order, Brock had in his possession $17,500.00." (T. .....)

The Court further stated:

"Under the state of the record, as we find it before us, sufficient evidence sustains the trial court's finding, and we must affirm its judgment, but that does not mean that Brock and Becker must necessarily spend the rest of their days in jail if they are never able to comply with the turn-over order. We have progressed considerably from the time when imprisonment for debt was commonplace. After a reasonable interval has elapsed, Brock and Becker may again seek to show the court their inability to comply with the turn-over order. *Maggio* v. *Zeitz, supra,* p. 72. On such a hearing, they should be prepared to make definite and accurate answers as to what was done with the assets formerly owned by the bankrupt and transferred to them, as well as their own assets." (T. .....)

Under the decision of the Circuit Court of Appeals, Petitioner is afforded a full opportunity to show by credible evidence that he is unable to comply with the turn-over order. The Court further said:

"If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail 'until he shall purge himself of his said contempt' should be modified, or the commitment vacated, and Brock and Becker released. But until such time, the order shall stand and it is hereby AFFIRMED." (T. .....)

The rules of law laid down in the opinion of the Circuit Court of Appeals are based upon and in accord with the principle asserted by this Court in the *Maggio* case.

No explanation was made by Petitioner as to what disposition he made of the funds which he wrongfully appropriated on the day and immediately preceding the filing of the petition in bankruptcy and which were in *custodia legis,* and should have been turned over to the Receiver. To merely state he does not have the funds does not end the controversy.

Rule 52 (a) of the Federal Rules of Civil Procedure provides among other things:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the trial court to judge of the credibility of the witnesses."

To no type of case is this last clause more appropriately applicable than to the one herein, where the evidence of Petitioner is evasive and incredible, deliberately staged to conceal his present holdings and property and to give the false impression that the money withdrawn from the bank on the day the Receiver was appointed was dissipated and is not now in his possession.

No "presumption" need be indulged in and no resort to "fiction" is required to visualize that on the day the Receiver was appointed the Petitioner withdrew all of the funds from the bank, $13,500.00 which belonged to, and was the property of the Receiver, and should have been turned over to the Receiver.

No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement that they are not in his possession. He had ample opportunity to show his inability to comply with the turn-over order. No showing was made.

The Circuit Court of Appeals has afforded Petitioner

the opportunity to show his inability to comply with the turn-over order. Petitioner, however, has chosen to conduct a series of extensive and expensive hearings and defenses in his efforts to avoid an accounting of the funds withdrawn by him.

Imprisonment to compel obedience to a lawful judicial order has not yet ceased, and ought not to cease. To hold otherwise would destroy all respect for the Courts by stripping them of power to enforce their lawful decrees. Such power is inherent in all Courts.

A copy of the record has not been served upon respondent as required by Rule 38 (3). Counsel for Petitioner has failed on request to supply Respondent with such copy. Respondent is therefor unable to supply page references to that portion of the record consisting of the opinion of the Circuit Court of Appeals.

The findings of the Referee, affirmed by the learned Judge, discrediting the excuses offered, and affirmed by the Circuit Court of Appeals require the acceptance by this Court of the conclusions reached by the Referee, the Judge, and the Circuit Court of Appeals.

The grounds presented in support of the Petition are clearly without merit and the Petition should be denied.

Respectfully submitted,

HARRY J. MYERSON and
LESLIE G. PEFFERLE,
Attorneys for Respondent, Robert C. Solomon, Trustee, etc.